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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF DEFENSE, PETITIONER

v.

NATIONAL SECURITY ARCHIVE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether respondent, which seeks government records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to include in its private repository of documents concerning the foreign relations, defense and intelligence policy of the United States, is a "representative of the news media" and therefore exempt under 5 U.S.C. 552(a)(4)(A)(ii) from the fees ordinarily charged a FOIA requester for the costs incurred by the agency in searching for documents.

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NATIONAL SECURITY ARCHIVE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States Department of Defense, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 880 F.2d 1381. The opinion of the district court (App., *infra,* 16a-27a) is reported at 690 F. Supp. 17.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 28a-29a) was entered on July 28, 1989, and the petition for rehearing was denied on September 26, 1989 (App., *infra,*

30a). On December 19, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Freedom of Information Act provides in pertinent part (5 U.S.C. 552(a)(4)(A)):

> (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
>
> (ii) Such agency regulations shall provide that –
>
> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
>
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
>
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

2. The Uniform Freedom of Information Act Fee Schedule and Guidelines promulgated by the Office of Management and Budget, and the regulations of the Department of Defense, both provide in pertinent part (5 C.F.R. 1303.30(j); 32 C.F.R. 286.33(e)(7)(i)):

> The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (*e.g.*, electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. * * *

STATEMENT

Respondent National Security Archive is a private repository of records relating to the national defense, foreign relations and intelligence policy of the United

States. It has filed several thousand (often wide-ranging) requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to establish and build its collection. The court of appeals held that respondent is exempt from the fees ordinarily charged a FOIA requester for the costs incurred in searching for documents, concluding that respondent qualifies for special treatment under a provision that exempts a "representative of the news media" from such fees. 5 U.S.C. 552(a)(4)(A)(ii).

A. THE STATUTORY AND REGULATORY SCHEME

1. Prior to 1986, the FOIA authorized an agency to charge fees to requesters for the costs of searching for and duplicating documents, but further provided that the fees should be waived or reduced whenever it was "in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. 552(a)(4)(A) (1982). In the Freedom of Information Reform Act of 1986,[1] Congress amended the FOIA fee provisions. Subparagraph (i) of the amended 5 U.S.C. 552(a)(4)(A) directs each federal agency to promulgate regulations, after notice and an opportunity for public comment, specifying the schedule of fees applicable to the processing of requests and establishing procedures and guidelines for determining when such fees should be waived or reduced. Each agency's schedule must "conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies." 5 U.S.C. 552(a)(4)(A)(i).

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[1] The Freedom of Information Reform Act of 1986 was enacted as Title I, Subtitle N of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207-48 to 3207-50.

Subparagraph (ii) of Section 552(a)(4)(A) requires the agency regulations to establish different fee schedules for each of three categories of requests. Category (I) consists of requests made for commercial use, for which fees may be assessed not only for document search and duplication, but also for reviewing documents to determine whether they will be released. Category (II), at issue here, consists of requests made by "educational institution[s]," "non-commercial scientific institution[s]," and "representative[s] of the news media." Entities in this most favored category may be charged fees only for duplication, not for search or review of documents (unless they are sought for a commercial use). Category (III) consists of any other request, for which, as under prior law, fees may be assessed for document search and duplication, but not review. 5 U.S.C. 552(a)(4)(A)(ii)(I)-(III).

The FOIA Reform Act of 1986 also revised the standard for granting an individual waiver or reduction of fees. Under the 1986 amendments, documents shall be furnished without any charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. 552(a)(4)(A)(iii).

2. In March 1987, pursuant to 5 U.S.C. 552(a)(4)(A)(i), OMB published in final form its "Uniform Freedom of Information Act Fee Schedule and Guidelines" for agencies to use in preparing their own fee regulations. 52 Fed. Reg. 10,012. The OMB guidelines define the categories of requests covered by the new fee provisions, 5 C.F.R. 1303.30(g)-(j), and prescribe the method for calculating the fees applicable to each. 5 C.F.R. 1303.40-1303.60. The Department of Defense (DoD) subsequently issued its FOIA fee regulations, which conform to the

OMB guidelines. 52 Fed. Reg. 25,977 (1987), codified at 32 C.F.R. 286.33. The OMB guidelines and DoD regulations both define "representative of the news media" to mean "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." 5 C.F.R. 1303.30(j) and 32 C.F.R. 286.33(e)(7)(i), quoted at page 3, *supra*. And both define "news" to mean "information that is about current events or that would be of current interest to the public," and identify as examples of news media entities "television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of 'news') who make their products available for purchaser or subscription by the general public." *Ibid.*

B. THE FACTS OF THIS CASE

1. In materials submitted to DoD, respondent National Security Archive described itself as a "public interest, scholarly research institute and library" in Washington, D.C. C.A. App. 42, 80. Its purpose is to "identify, obtain, house, index, analyze, and disseminate contemporary declassified and unclassified United States government documents pertaining to foreign, defense, intelligence and national security policy." *Id.* at 21. The documents are obtained in large part through requests under the FOIA. *Id.* at 22, 24-25, 43, 80. Respondent serves "as a traditional repository for the documents," *id.* at 22, which it will "make available to scholars, journalists, congressional staffs, present and former public officials, other public interest organizations and the general public" (*id.* at 42). "To facilitate user access to documents, the Archive's primary activity is the creation of detailed cross-referenced indices, other finding aids, and a sophis-

ticated computerized retrieval system." *Ibid.* Respondent also plans to organize its records into document "sets" covering discrete subject matters. *Ibid.* Although respondent currently receives grants from private foundations (*id.* at 21), it proposes that in the future, "[t]he activities of the Archive will be largely supported by income raised from sales of the indices and microform copies of major sets of documents to research libraries and other identified client groups." *Id.* at 22; see also *id.* at 23, 32-36. Material submitted to DoD stated that respondent would charge approximately $1,000 for each document set and $350 for each index. *Id.* at 34.[2]

2. After passage of the FOIA Reform Act of 1986, respondent applied to DoD for the most favored fee status, under which it would be charged only for copying, not for search or review of documents. 5 U.S.C. 552(a)(4)(A)(ii)(II). Respondent contended that it qualified for that status as an "educational institution" or a "representative of the news media." DoD found that respondent did not qualify on either basis, observing that respondent "has asserted many times * * * that it is something different—'a nonprofit public interest scholarly research institute and library.' " C.A. App. 146 (quoting *id.* at 80).

As relevant here, DoD determined that respondent is not a "representative of the news media" because it is not

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[2] Respondent has recently made available for purchase, at a price of $3900, its first indexed document set, which concerns United States policy toward El Salvador. The materials consist of a microfiche collection of the documents themselves, together with two hardbound volumes that contain chronological, subject-matter, and name indices and several glossaries. See 1 & 2 National Security Archive, *El Salvador: The Making of U.S. Policy, 1977-1984* (1989). Respondent also published a paperback volume entitled *The Chronology: The Documented Day-by-Day Account of the Secret Military Assistance to Iran and the Contras* (1987).

"organized and operated to publish or broadcast news to the public," as required by DoD regulations, 32 C.F.R. 286.33(e)(7)(i). C.A. App. 148-150.[3] DoD reasoned that a document library does not qualify as a member of the news media merely because it makes documents available to the public and disseminates them, because "[t]he media are those who *themselves* undertake to publish information to the general public (or some segment thereof)" and because "such organizations do not simply collect and organize raw documentary materials for someone else's use—they report the news." *Id.* at 149. Moreover, here, "the activities in which [respondent] engages to disseminate directly appear to be clearly secondary to its principal mission as a private document library." *Ibid.* DoD found its conclusion to be supported by the plain meaning of the statutory term "news media," and by Senator Hatch's explanation that (a) the term "media" is to be given its " 'common meaning,' " and (b) a mere " 'disseminator of public information' " does not qualify, since " 'information vendors, data brokers, and other secondhand disseminators of documents . . . would hardly qualify under any reasonable construction of the term "media." ' " C.A. App. 151, 152, quoting 132 Cong. Rec. S16,505 (daily ed. Oct. 15, 1986).

3. In this action for judicial review, the district court sustained DoD's decision. App., *infra*, 16a-27a, 32a.[4] In light of respondent's description of itself as a "research

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[3] DoD also concluded that respondent does not qualify as an "educational institution" because it is not a school or institution of higher, professional or vocational education that operates a program of scholarly research, as required by 32 C.F.R. 286.33(e)(4). C.A. App. 147-148.

[4] Respondent initially brought this action in December 1986, challenging DoD's alleged policy of denying it fee waivers. After

institute and library" that "make[s] available government information," the court found "no basis to disagree with DoD's determination" that respondent "is neither an education[al] institution nor a representative of the news media within the meaning of DoD's regulations." *Id.* at 19a, 20a. In fact, the court noted that respondent "does not contest DoD's determination" under those regulations. *Id.* at 20a. The court rejected respondent's contention that it should review DoD's action without regard to the regulations, because to do so "would render both the regulations and Congress's direction to promulgate them meaningless." *Id.* at 20a n.2. It explained that where, as here, "Congress leaves gaps in a program by authorizing the agency to adopt implementing regulations, it has delegated to the agency the power to fill those gaps." *Ibid.*, citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843-844 (1984).

The district court also rejected respondent's contention that DoD's regulations are inconsistent with congressional intent. App., *infra*, 21a-26a. Because Congress did not define the relevant terms, the court explained, it left that task to OMB and the agencies, and the court found the definitions in the OMB guidelines and DoD regulations to be reasonable and consistent with congressional intent. *Id.* at 21a. "If anything," the court observed, "the legislative history reveals a clear congressional decision to deny status waivers to entities like [respondent]," because Congress deleted a provision that would have granted preferred status tc any " 'nonprofit group that intends to make the information available' 'to the news media, any

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passage of the 1986 amendments, the suit was stayed while respondent sought preferred fee status under 5 U.S.C. 552(a)(4)(A)(ii)(II). After the effective date of DoD's regulations, and following a provisional ruling by DoD, the court remanded the matter for DoD to make the final determination discussed in the text.

branch or agency of Federal, State or local government, or the general public.' " *Id.* at 21a-23a & n.3, quoting H.R. 6414, 98th Cong., 2d Sess. § 4 (1984). Thus, in the court's view, respondent was "trying to obtain a status waiver through the judicial process after entities like it were denied such waivers in the legislative process." App., *infra,* 25a. The court further reasoned that mere dissemination of information is insufficent to qualify an entity as a "representative of the news media," because even the legislative history cited by petitioner (which in any event conflicted with the statements of Senator Hatch) "contemplate[s] some sort of regular publication, broadcast, or other transmission of news." *Id.* at 24a. Because respondent's functions were not of that character and were not " 'similar to that of newspapers and broadcasters,' " the court found that it could not be included in the preferred category. *Ibid.* (quoting 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (joint analysis of Reps. English and Kindness)).

4. The court of appeals affirmed the district court's holding that respondent does not qualify as an "educational institution" but reversed its holding that respondent does not qualify as a "representative of the news media." App., *infra*, 1a-15a, 28a-29a. In finding that the DoD regulations reasonably construe the term "educational institution" (*id.* at 4a-9a), the court noted that the ordinary meaning of that term is "school." *Id.* at 5a. And like the district court, the court of appeals found it significant that Congress had deleted the language that would have granted favored fee status to groups that intend to make the information available to the public, since respondent's interpretation of "educational institution" to include its own activity in that regard would effectively reintroduce the deleted provision. *Id.* at 6a-7a. Finally, the court noted that the sponsors' floor statements were in conflict on the significance of that deletion. *Id.* at 7a-8a. Because the

legislators "were apparently content to vote without resolving the issue, thus punting the issue to the courts," the court chose to "fall back upon" the conventional rule that a change in statutory language is not without effect. *Id.* at 9a. And because the sponsors were in conflict, the court could not "rely upon any of their statements to supply a meaning that [it did] not find on the face of the statute when read as ordinary language." *Ibid.*

By contrast, when considering respondent's alternative claim that it qualifies for preferred fee status as a "representative of the news media" (App., *infra,* 9a-14a), the court of appeals declined to attach the same significance to the ordinary meaning of the statutory text, to Congress's deletion of the provision that would have applied directly to respondent's activities, or to the conflicting statements of the sponsors. The court instead relied on floor statements by several Members of Congress that it found to be inconsistent with those indicia of congressional intent and with the interpretation embodied in the OMB guidelines and DoD regulations. Thus, rejecting the government's argument that the statutory term "representative of the news media" must be tied to the "news media" as commonly understood, the court held that respondent's plans to compile expensive sets of documents and accompanying indices and sell them to libraries, scholars and others for research purposes gave it the same status as a newspaper or radio or television station—without regard to whether the substance of the documents is "news" or whether the offering of such materials for sale is a recognized "medium" for the communication of news. *Id.* at 11a-13a.[5]

[5] The court of appeals also rejected DoD's contention that respondent is ineligible for reduced fees because it requests documents for a "commercial use." App., *infra,* 14a-15a. We do not seek review of that holding here.

REASONS FOR GRANTING THE PETITION

The court of appeals has seriously misconstrued the fee provisions of the Freedom of Information Act. Respondent is not a member of the "news media" in any accepted meaning of that term. As its name makes clear, respondent is something quite different: it is an "Archive"—a private repository—of government documents pertaining to the national security of the United States. Respondent therefore is not entitled to the favored fee status that Congress granted to "representative[s] of the news media," which regularly publish or broadcast news about current events or events of current interest to the public at large, or to a significant portion of the public. The court of appeals' contrary holding conflicts with the plain meaning of the statutory language and with OMB guidelines and DoD regulations entitled to substantial deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and it fails to respect Congress's decision to delete a provision that would have specifically applied to respondent's activities of making information available to the public.

Respondent has already filed several thousand FOIA requests with a variety of government agencies, including the Department of Defense, the Department of State, the Central Intelligence Agency (CIA), and the National Security Council (NSC), in order to establish and build its private collection of government records. Those requests are often wide-ranging in nature, precisely because respondent seeks comprehensive documentation of entire subject areas of the foreign relations, national defense, and intelligence policy of the United States. Respondent of

course has the right to file FOIA requests and to obtain nonexempt documents. But like other FOIA requesters, respondent must reimburse the government for the costs incurred by the agency in searching for (and copying) the documents it seeks in amassing its collection.

In enacting the 1986 amendments, Congress specifically intended to require FOIA requesters to pay their own way by paying the search costs imposed on the agency, unless the exception for the "news media" and other specified requesters applied. The court of appeals has expanded the scope of that exception far beyond the limits Congress imposed, by including entities that do not publish "news" in the ordinary sense and do not utilize the "media" through which news is ordinarily communicated. Because the decision below therefore opens a sizeable loophole in the FOIA fee structure for respondent and similar entities seeking to amass government records and broker them to third parties, it is of substantial practical importance in the administration of the FOIA. It will deprive the United States of reimbursement for the many hours of employees' time consumed in searching for documents in response to each of the FOIA requests filed and yet to be filed by respondent and others similarly situated. But in addition, the decision below, if allowed to stand, will remove the usual and salutary incentive for requesters such as respondent to fashion their requests economically. This impact will be especially acute in the case of respondent and similar entities that may follow its lead in other areas of government activity, because their very purpose is to establish complete collections of government documents on a program-wide basis. The decision below also will redound to the detriment of other FOIA requesters, because agency responses to their requests will inevitably be delayed by the reallocation of scarce resources to the

voluminous and wide-ranging requests filed by entities such as respondent. Review by this Court therefore is warranted.

A. The court of appeals' decision is inconsistent with the plain meaning of the statutory text, the administrative interpretation of that text, and Congress's decision to delete a provision that would have specifically applied to respondent's activities. It also improperly subordinates these authoritative sources of statutory interpretation in favor of ambiguous floor statements by several Members of Congress that are themselves in conflict with other floor statements. For these reasons, the ruling below cannot be squared with basic principles of statutory construction and administrative law.

1. When a court reviews an agency's construction of the statute it administers, the first question is whether Congress "has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *Mead Corp.* v. *Tilley*, 109 S. Ct. 2156, 2162 (1989); *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112, 123 (1987). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to elucidate the statutory provision by regulation, which is given controlling weight unless it is " 'arbitrary, capricious, or manifestly contrary to the statute.' " *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986), quoting *Chevron*, 467 U.S. at 843-844. Even where the delegation to the agency is only implicit, the court may not

substitute its own construction for a reasonable construction by the agency. *Chevron*, 467 U.S. at 844.

2. In the Freedom of Information Reform Act of 1986, Congress reaffirmed the general rule that FOIA requesters must pay fees to reimburse the government for (at least) the costs of searching for and copying documents. The 1986 Act created a single exception to that rule for certain requesters, which are exempted from search fees. This favored fee status is available to, *inter alia*, "a representative of the news media." 5 U.S.C. 552(a)(4)(A)(ii)(II). The FOIA itself does not define the quoted term. Instead, that task is left to OMB and each agency, in promulgating the implementing guidelines and regulations required by 5 U.S.C. 552(a)(4)(A)(i). See *Media Access Project* v. *FCC*, 883 F.2d 1063, 1069 (D.C. Cir. 1989). The OMB guidelines and DoD regulations define the statutory term "representative of the news media" to mean "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public," listing as examples "television or radio stations broadcasting to the public at large, and publishers of periodicals * * * who make their products available for purchase or subscription by the general public." 5 C.F.R. 1303.30(j); 32 C.F.R. 286.33(e)(7)(i).

Respondent unquestionably fails to qualify under these regulatory standards, because it is not an "entity that is organized and operated to publish or broadcast news to the public." 5 C.F.R. 1303.30(j); 32 C.F.R. 286.33(e)(7)(i). The district court agreed, observing that respondent did not contest DoD's ruling that it is not exempt from search fees under DoD regulations. App., *infra*, 20a. The court of appeals likewise did not take issue with the determination that respondent fails to qualify as a "representative of the news media" under the governing regulations. *Id.* 3a-4a. It therefore should have affirmed that determina-

tion, because, as we shall now explain, the statutory construction embodied in the regulations is, at the very least, reasonable, and is therefore binding on the courts.

a. " '[T]he starting point for interpreting [the] statute is the language of the statute itself.' " *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989), quoting *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the statute on its face excludes respondent from the special fee status, because the ordinary meaning of the phrase "representative of the news media" does not encompass such an entity. The term "media" denotes "the means of communication, such as radio and television, newspapers, and magazines, that reach or influence people widely." *Random House Dictionary of the English Language* 1193 (2d ed. 1987). And the term "news" denotes "a report of a recent event; intelligence; information," and the "presentation of a report on recent or new events in a newspaper or other periodical or on radio or televison." *Id.* at 1295. Accord, *Webster's Third New International Dictionary* 1524 (1986) ("news" means "a report of a recent event"; "what is reported in a newspaper, news periodical, or news broadcast"; what is "suitable for news copy"); *id.* at 1403 ("medium" means "a channel, method, or system of communication"). Compare *John Doe Agency* v. *John Doe Corp.*, 110 S. Ct. 471, 476 (1989) (construing "plain words" of the FOIA).

The foregoing definitions distinguish a member of the "news media" from an ordinary book publisher, even one that publishes books that provide in-depth analysis of historical events, including those of recent origin. Yet respondent does not even engage in the latter activity. Aside from its primary function of assembling materials for its repository and making them available to the public at one location, all respondent does is (1) organize and publish verbatim certain documents that furnish *raw material* for

discussion and analysis of events by others, and (2) compile indices and other finding aids to facilitate access to that raw material. Those are functions that might be performed by any library or repository of documents.

Nor do the rather ponderous document sets and indices that respondent plans to sell remotely resemble the newspapers, magazines, or radio and television broadcasts that are typically encompassed by the term "news media." The sets and indices will not be released on a regularly scheduled basis; they will not be broadly disseminated directly to the public at large or to a substantial subset of the public, but instead will be sold to libraries and others for purposes of research;[6] the price of the materials indicates they they are primarily for research purposes and distinguishes them from the reasonably affordable channels for receiving genuine "news"; most of the documents or indices will not themselves be of the broad and immediate public interest typically associated with the news or be readily comprehensible by typical consumers of the news; and respondent does not exercise the sort of editorial judgment ordinarily required of the media—namely, the reviewing, digesting, and condensing of raw information to make it understandable to the public. In short, whatever may be the precise scope of the statutory term "representative of the news media" in marginal applications, it is clear that respondent falls beyond its outer limits.

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[6] As DoD ruled in the administrative proceedings, "[t]he media are those who *themselves* undertake to publish information to the general public (or some segment thereof)." C.A. App. 149. See *Larson* v. *CIA*, 843 F.2d 1481, 1483 n.5 (D.C. Cir. 1988) ("special solicitude for journalists" in 1986 FOIA fee provisions "does not extend to citizens who intend to release requested information to journalists because 'such a rule would enable requesters to avoid fees simply by asserting an intention to give the released documents to a newspaper' ").

b. The statutory text of course does not stand alone. In subparagraph (i) of 5 U.S.C. 552(a)(4)(A), Congress directed OMB and the agencies to promulgate implementing guidelines and regulations, after notice and comment. Because subparagraph (ii) requires the agency regulations to establish different fees for each of three categories of requests, the express directive in subparagraph (i) to issue regulations specifying the schedule of fees necessarily subsumes the power to define more precisely the categories to which those fees are applicable. The DoD regulations at issue here therefore should be sustained unless they are manifestly contrary to the Act. *Chevron*, 467 U.S. at 844. Even if the regulations do not have legislative effect, they are, at a minimum, entitled to substantial deference and therefore are controlling if they rest on a "reasonable interpretation" of the Act. *Ibid.* Because the meaning given the statutory term "representative of the news media" by the OMB guidelines and DoD regulations is essentially identical to the plain meaning of that term (see 52 Fed. Reg. 10,014-10,015 (1987)), it clearly is "sufficiently rational" to bind the courts. *Chemical Manufacturers Ass'n* v. *NRDC, Inc.*, 470 U.S. 116, 125 (1985).

The DoD regulations are entitled to special weight here for two additional reasons. First, they represent a contemporaneous construction of the fee provisions of the Freedom of Information Reform Act of 1986 by those " 'charged with the responsibility of setting [their] machinery in motion' " (*Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984)). Second, because DoD's regulations conform to the government-wide guidelines issued by OMB pursuant to its responsibility to establish a uniform fee schedule under 5 U.S.C. 552(a)(4)(A)(i), and because all government agencies have coordinated their regulatory activities

and conformed to OMB guidelines to ensure consistency throughout the government,[7] the DoD regulations embody "an interpretation followed by all agencies of the Government." *United States* v. *Bergh*, 352 U.S. 40, 46 (1956). The court of appeals should not have so lightly disregarded this considered judgment by responsible officials throughout the Executive Branch.

c. Although the court of appeals did not find it self-evident precisely what the term "representative of the news media" does cover (App., *infra*, 9a), it did not deny that the ordinary meaning of that phrase and the regulations implementing it do *not* cover respondent. The court of appeals instead based its decision on several statements by individual legislators. Generally, however, the statutory language must control, "[a]bsent a clearly expressed legislative intention to the contrary" (*CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 108); see *United States* v. *Weber Aircraft Co.*, 465 U.S. 792, 798 (1984). Here, the legislative history contains no such "clearly expressed" intention.

The Freedom of Information Reform Act of 1986 was added as a floor amendment to the omnibus anti-drug legislation near the close of a legislative session, and the FOIA fee provisions therefore were enacted without the benefit of committee reports or equivalent statements of consensus views that ordinarily accompany such legislation. For this reason, it is not surprising that, in some respects, the legislative history of the fee provisions "tugs in more than one direction." See *Abourezk* v. *Reagan*, 785

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[7] See, *e.g.*, 22 C.F.R. 171.10(k) (Department of State); 31 C.F.R. 1.5(c)(2)(i)(C) (Department of the Treasury); 28 C.F.R. 16.10(j)(8) (Department of Justice); 15 C.F.R. 4.9(a)(8) (Department of Commerce); 45 C.F.R. 5.5 (Department of Health and Human Services); 10 C.F.R. 1004.2(m) (Department of Energy); 32 C.F.R. 1900.3(q) (CIA); 40 C.F.R. 2.100(h) (EPA); 29 C.F.R. 102.117(d)(vii) (NLRB); 47 C.F.R. 0.466(a)(7) (FCC); 49 C.F.R. 1002.1(f)(3) (ICC).

F.2d 1043, 1054 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987). Those cross-currents in what individual Members said, however, should not obscure what Congress did.

When the fee provisions were first before the Senate in 1986, two changes were made in the language of the original House bill. First, the preferred fee section was revised to remove language that specifically included those who sought information "by or on behalf of" others. 132 Cong. Rec. 26,770 (1986) (remarks of Sen. Hatch). The purpose of this deletion was "to limit the breadth of the categorical waiver provision to those requesters who seek Government records for their own scholarly or media work" (*ibid.*), and its effect was to preclude entities like respondent from obtaining preferred fee status by serving as a "middle man" or broker of information that will actually be used by others.

Second, the Senate amendment omitted language in the original House bill that would have granted preferred fee status to any "nonprofit group that intends to make the information available to the news media, any branch or agency of Federal, State or local government, or the general public." 132 Cong. Rec. 26,770 (1986) (remarks of Sen. Hatch); see pages 9-10, *supra*. This language would have specifically applied to respondent's activities of making the information it obtains from the government available to the news media and the public. But " '[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987), quoting *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting); see also *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974). Thus, Congress's deletion of this provision strongly reinforces the interpretation of the

statutory text that is indicated by its plain meaning, under which respondent falls outside the special exemption.

The significance of this deletion, standing alone, is confirmed by Senator Hatch's contemporaneous explanation that it was made "to clarify that organizations seeking to establish private repositories of public records shall not qualify for a waiver." 132 Cong. Rec. 26,770 (1986). He continued (*ibid.*):

> These groups purport to act as an intermediary between the Government and requesters in seeking records that requesters could seek directly from the Government. This type of private library of public documents, whether operated for profit or not, should not qualify for a waiver under the standards of this bill.

When the 1986 amendments were again before the Senate to consider technical amendments, Senator Hatch again stated (*id.* at S16,505 (daily ed. Oct. 15, 1986)):

> [T]hese provisions are not intended to permit a fee waiver to any requester simply on the basis of his status as a disseminator of public information. * * * [I]nformation vendors, data brokers, and other second-hand disseminators of documents * * * would hardly qualify under any reasonable construction of the term "media" * * *.

Accordingly, as the district court observed, respondent "is trying to obtain a status waiver through the judicial process after entities like it were denied such waivers in the legislative process." App., *infra*, 25a.

The court of appeals believed, however, that the effect of Congress's deletion of the statutory language just discussed, and Senator Hatch's explanation of that deletion, were overcome by the statements of several Members of Congress that, in its view, pointed in a different direction.

In particular, the court cited general statements that the phrase "representative of the news media" is to be "broadly interpreted" (132 Cong. Rec. 27,190 (1986) (remarks of Sen. Leahy)), that any organization "which regularly publishes or disseminates information to the public" should qualify (*ibid.*), and that "[a] request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision" (*id.* at H9463 (daily ed. Oct. 8, 1986) (joint analysis of Reps. English and Kindness)). Based on these passages, the court construed the Act to confer preferred fee status on any entity that engages in some sort of "publishing" or "dissemination" of information. App., *infra*, 11a-12a.

When read in context, however, the references to publishing or dissemination by Senator Leahy and Representatives English and Kindness appear to refer to disseminations of the sort made by "a newspaper, magazine, television or radio station," which are expressly mentioned in the same passages—*i.e.*, direct disseminations of *news* by entities organized and operated for that purpose. There is no suggestion in the passages quoted by the court of appeals that a private repository of government records, such as respondent, would qualify for a blanket exemption from search fees solely because it occasionally sells records from its collection in the form of document sets. Indeed, the Members viewed the touchstone to be whether the organization's dissemination functions are "similar to that of newspapers and broadcasters." 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (joint analysis of Reps. English and Kindness). Moreover, as the district court pointed out, "[t]he remarks cited by [respondent], even when they refer to non-traditional media, still seem to contemplate some sort of *regular* publication, broadcast, or other transmission of *news*."

App., *infra*, 24a (emphasis added). Respondent's publications do not have that character.

Even if the floor statements cited by the court of appeals were thought to lend some support to respondent's position, such statements by individual legislators, including those involved in developing legislation, are not necessarily an authoritative expression of the intent of Congress as a whole. See *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). That is especially so where, as here, the expressions (as understood by the court of appeals) are inconsistent with the plain meaning of the statutory text, implementing regulations, and Congress's deletion of statutory language that would have specifically covered entities that make information available to the public. Moreover, the Members whose statements the court of appeals relied upon apparently did not favor that deletion. It is axiomatic that the statements of opponents of a measure (here, the deletion of the language) are less authoritative than those of the proponent. *Bankamerica Corp.* v. *United States*, 462 U.S. 122, 139 (1983); *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); compare *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 526-527 (1982).[8] If we nevertheless assume that those statements have the meaning and force that the court of appeals attached to them,

[8] Representative English admitted that he was "not in complete agreement with the Senate changes" to his proposal. 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986). But he then suggested that those changes could be papered-over through floor statements, saying that "[i]t is unnecessary, therefore, to amend the text of the bill since the intent has been so clearly stated." *Ibid.* This attempt to convert a losing position into a winning one through mere floor statements inserted in the legislative history should not be sanctioned by the courts. See *United States* v. *Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part) (courts "should not make the equivalency between making legislative history and making an amendment so plausible").

the fact remains that they conflict with the views of another principal sponsor, Senator Hatch. Thus, at most, the floor statements to which the court of appeals gave dispositive weight are contradictory, and they cannot override the other, compelling indicia of legislative intent.

B. The decision of the court of appeals creates a substantial loophole in the graduated fee schedules that Congress mandated in the Freedom of Information Reform Act of 1986. A number of adverse consequences will follow if that decision is allowed to stand. The Federal Treasury will be forced to subsidize respondent's efforts to establish a comprehensive private repository of government records about the national security of the United States, because the government, not respondent, will bear the expenses incurred by numerous federal agencies in undertaking potentially limitless searches for documents to be added to respondent's collection.

More broadly, the unwarranted expansion of the exemption from search fees fashioned by the court below removes a meaningful and reasonable financial incentive for requesters to tailor their FOIA requests, eliminating an important element of economic discipline in the allocation of scarce resources to the retrieval and dissemination of government information. As a result, entities such as respondent will have carte blanche to deluge agency FOIA offices with wide-ranging requests seeking information the disclosure of which may contribute little or nothing to the public understanding of government operations or activities. This danger is particularly acute in the context of private repositories or libraries, whose very purpose is to build comprehensive collections.

This potential is borne out by the experience with the requests submitted by respondent alone. Respondent has flooded government agencies with requests for records in order to compile document sets (which it says will average

10,000 pages each (C.A. App. 27)) on what respondent projects to be more than 150 separate but broad topics pertaining to the foreign relations, national defense, and intelligence policy of the United States. A brief perusal of the document sets that respondent informed DoD that it was working on or planning illustrates both the extraordinary scope of this undertaking and its focus principally on history rather than "news." C.A. App. 28-31, 55-58.[9] The number of FOIA requests made by respondent to accomplish its goals has been correspondingly enormous. We have been informed, for example, that since 1986, shortly after respondent was founded, respondent has

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[9] The approximately 170 projected topics included in respondent's submission to DoD included: U.S. policy toward El Salvador, 1952-1985; U.S. policy toward Iran, 1952-1980; U.S. policy toward numerous other countries, including China, Panama, Cuba, and Mexico; U.S. intelligence policy documents, structure, organization and mission of component agencies, 1952-1985; the history of U.S. Military uses of space; the history and evolution of Joint Chiefs of Staff organization; various subjects relating to U.S.-U.S.S.R arms policy and negotiations; U.S. and Soviet materials on Soviet crisis decision-making; U.S. policy toward the International Monetary Fund and the Third World debt crisis, 1977-1985; U.S. international oil and energy policies, 1952-1985; U.S. policies on human rights, 1952-1986; and U.S. defense relations with Canada, 1952-1985.

In the introduction to its recently published document set, *El Salvador: The Making of U.S. Policy, 1977-1984*, respondent lists (Volume 1, at 7) the following "on-going documentation projects" for which it expects to have results within the next few years: U.S. policy toward Afghanistan; the Berlin Crisis, 1958-1961; chemical and biological warfare; the Cuban Missile Crisis; U.S. economic sanctions against the Soviet Union and Eastern Europe; U.S. policy toward Iran and the Iranian revolution, 1977-1980; the Iran-Contra Affair, 1983-1988; low-intensity conflict policy; U.S. policy toward Nicaragua, 1977-1988; U.S. nuclear non-proliferation policy; U.S. policy toward the Philippines; U.S. Presidential decision documents; U.S. policy toward South Africa; U.S. tactical forces in Europe; and U.S. intelligence policy.

filed 1116 FOIA requests with DoD, 868 with the Department of State, 581 with the NSC, and 285 with the CIA.[10] In mid-January 1990, respondent had 599 requests pending with the Department of State, which constituted more than 50% of that Department's FOIA caseload.[11] Many of these individual FOIA requests are wide-ranging,[12] and even narrower requests can require extensive searching.

Moreover, the potential impact of the decision is not limited to respondent's requests. Presumably any group interested in other areas of government activity, such as environmental regulation, immigration, or labor relations, would have a comparable incentive to form a private library or repository of government records at government expense. In fact, several entities not traditionally considered members of the "news media"—Greenpeace, the Guatemalan Human Rights Commission/USA, the Center for National Security Studies, the Christic Institute, and the Wisconsin Committee on Occupational Safety and

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[10] In some instances, a request is referred from one component of DoD to another, which may result in double-counting of some requests.

[11] The Department of the Treasury, Department of Commerce, FBI, Agency for International Development, and Arms Control and Disarmament Agency also have received a number of requests from respondent.

[12] Several recent examples of requests submitted to the State Department are for: "Copies of all records including but not limited to cables, memoranda, assessments and analyses relating in whole or in part to collaboration between Israel and South Africa on military technology and nuclear research from 1975 to 1989" (11/2/89); "Any papers produced by the Bureau of Intelligence and Research during 1958-1960 and 1961 concerning Berlin, German issues, European defenses, and East-West disarmament negotiations" (10/17/89, 10/18/89); "All cables, briefing papers, memos and reports relating to Vice President Mondale's visit to the People's Republic of China in August 1979" (8/11/89).

Health—have already invoked the decision below to request favored fee status from federal agencies.

The adverse consequences of that decision would be borne by more than the taxpayers and already overburdened agency FOIA offices. It would be borne as well by every other FOIA requester who would necessarily be disadvantaged by the preferential treatment of such requesters. All FOIA requesters unavoidably compete for a finite supply of agency time and resources. See *Weisberg* v. *United States Department of Justice,* 745 F.2d 1476, 1497 (D.C. Cir. 1984); *Open America* v. *Watergate Special Prosecution Force,* 547 F.2d 605, 614 (D.C. Cir. 1976). The realization of one FOIA requester's self-interest, particularly given the exceptional and burdensome nature of the demands imposed by groups such as respondent, can work very much to the detriment of other FOIA requesters.[13]

In light of these significant practical consequences of the decision of the court of appeals and the clear errors in its legal ruling, that decision warrants review by this Court. This conclusion is not undermined by the absence of a circuit conflict on the question. Under 5 U.S.C. 552(a)(4)(B), any civil action under the FOIA may be brought in the United States District Court for the District of Columbia, in which the decision below on the fee issue will be binding precedent. In light of this venue provision and the resulting importance of the decisions of the

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[13] By the same token, a holding by this Court that respondent does not qualify for the most favorable fee status on a blanket basis does not mean that respondent would be unable to secure an individualized waiver or reduction of fees in those instances in which it demonstrates that the disclosure of particular documents and its intended use would serve the public interest by contributing significantly to public understanding of the operations or activities of the government. See generally *Larson* v. *CIA,* 843 F.2d 1481 (D.C. Cir. 1988).

District of Columbia Circuit on questions arising under the FOIA, the Court has in the past granted certiorari to review important FOIA rulings by that court even in the absence of a circuit conflict. See, *e.g.*, *CIA* v. *Sims*, 471 U.S. 159 (1985); *FBI* v. *Abramson*, 456 U.S. 615 (1982); *FOMC* v. *Merrill*, 443 U.S. 340 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). It should do so again here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1990

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5217

NATIONAL SECURITY ARCHIVE, APPELLANT

v.

U.S. DEPARTMENT OF DEFENSE

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 86-03454)

Argued May 25, 1989
Decided July 28, 1989

Before: ROBINSON, MIKVA and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: The Freedom of Information Reform Act of 1986 amends the Freedom of Information Act by providing for reduced fees for certain types of document requests made by any entity that qualifies as "an educational . . . institution" or as "a rep-

representative of the news media." Based upon its "collect[ion] and disseminat[ion of] comprehensive government documentation pertaining to selected issues of major public concern in the areas of foreign, defense, intelligence, and international economic policy," the National Security Archive requested that the Department of Defense classify it as, alternatively, "an educational . . . institution" or "a representative of the news media." Pursuant to regulations it had adopted defining those two statutory terms, DoD denied the request. The Archive challenged that denial in district court, and on cross-motions for summary judgment, the court affirmed DoD's determination. We now affirm in part and reverse in part. We hold that the Archive is not an educational institution, but that it is a representative of the news media. In that capacity, it is eligible for preferential pricing under FOIA.

I. STATUTORY SCHEME

As originally enacted in 1974, FOIA required generally that a person requesting records pay the costs of searching for and duplicating the documents requested, but provided, elliptically, that an agency must waive or reduce such fees if to do so would be "in the public interest because furnishing the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A) (1982). Through FIRA, Congress revised this framework by directing government agencies to adopt fee regulations in compliance with a detailed set of statutory specifications that varies an agency's ability to charge fees depending both upon whether a requester has a particular status and upon whether the specific request is for a commercial or a non-commercial purpose.

As thus amended, FOIA initially provides that an agency may properly charge a FOIA requester a fee sufficient

to recover: the cost of searching for documents within the scope of the request; the "direct" cost of initially reviewing any documents unearthed by the search in order to determine whether they are disclosable; and the cost of duplicating the documents that are disclosed. 5 U.S.C. § 552(a)(4)(A)(iv). An agency may require anyone making a request "for commercial use," 5 U.S.C. § 552(a)(4)(A)(ii)(I), to reimburse it for all three types of recoverable costs. With respect to a request "not . . . for commerical use," the agency may normally exact a fee based upon the costs of search and of duplication, but may not recover the cost of its review. 5 U.S.C. § 552(a)(4)(ii)(II). An exception is made, however, in cases of a request "not . . . for commercial use" that is made by "[1] an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or [2] a representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In such cases, an agency may impose upon the requester only the cost of duplicating the records it releases. *Id.* In addition to these preferences based upon the nature both of the requester and of the request, FIRA provides a new standard for case-by-case waiver of fees for any request that is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

II. ANALYSIS

The Archive argues that it qualifies for preferential fee treatment under FOIA as, alternatively, an educational institution or a representative of the news media. The Government disputes both claims, of course, but it also argues that DoD's interpretation of FIRA, as reflected in

its implementing regulations, is "owed great deference" by the court under the rule in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). The Archive denies that *Chevron* applies, arguing that the *de novo* review provision of FIRA, 5 U.S.C. § 552(a)(4)(A)(vii), which applies "[i]n any action regarding the waiver of fees under this section," governs the questions this case presents. We need not resolve this dispute, however. Even viewing the matter *de novo*, we do not believe that the Archive qualifies as an educational institution under FIRA. Contrariwise, even if we are to defer to an agency's reasonable interpretation of an ambiguous statutory term, the statute, read in light of the legislative history, *Chevron*, 467 U.S. at 843 n.9, is clear: Congress intended that an organization like the Archive qualify as a representative of the news media. We thus have no occasion to inquire into the reasonableness of DoD's conclusion to the contrary.

A. *"An Educational Institution"*

DoD's regulation provides that

> [t]he term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

32 C.F.R. § 286.33(e)(4). Assuming that our review is *de novo*, the question before us is whether the term refers exclusively to schools, as DoD maintains, or whether, as the Archive contends, we should read the statute more broadly to include "institutions that disseminate information to the public," such as a "non-profit private research institution and library" that makes its holdings available for public use.

The ordinary meaning of the term "educational institution" is "school." The Archive does not dispute this point, but argues instead that we should not read "educational institution" as a single idiomatic term, but rather as a noun and an adjective. That is to say, the Archive suggests that we determine whether it is an institution the purpose of which is educational. Because (1) the Archive is an entity ("institution") that (2) seeks to make information available to the public ("educational"), it contends that (3) it is an "educational institution" under FIRA; it is all as simple as (1) plus (2) equals (3).

We have no occasion, however, to evaluate the Archive's claim to be an institution with an educational purpose, for we are unwilling to adopt the strained interpretation of the statutory term that would make that question relevant. It is often the case that two words, used in conjunction, convey a meaning different from that which they would bear if interpreted separately. For instance, the common understanding of the term "parking ticket" is a notice of fine for the violation of a law governing the parking of vehicles. The Archive's interpretive approach, as applied to this example, would dictate that we read the term to refer to a ticket that has to do with parking, and therefore broaden it to include a permit to park in a particular lot.* We would be disinclined to adopt such a strained construction of "parking ticket."

The weakeness in the Archive's position is reflected in its own argument when it points out that the Internal Revenue Service recognizes that "organizations, like Archive, that disseminate information to the public," are "organized and operate exclusively for . . . educational purposes" within the meaning of 26 U.S.C. § 501(c)(3).

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* As applied to the term "monkey business," on the other hand, the Archive's approach would yield a narrow definition that does not even include the ordinary meaning of the term.

The Archive suggests that we adopt a similar reading of "educational institution" in FIRA. If, like § 501(c)(3), FIRA referred to "institutions operated for an educational purpose," we might well agree with the Archive's interpretation, but the language of FIRA is different. The Archive's argument shows only that when Congress means a statute broadly to cover organizations that provide services that can be characterized as "educational," it has a model near to hand. It knows how to use it, too. *See, e.g.*, 15 U.S.C. § 77c(a)(4) (exempting from registration requirements of Securities Act of 1933 "[a]ny security issued by a person organized and operated exclusively for . . . educational . . . purposes . . ."). *Cf.* 12 U.S.C. § 1706e(k)(2) (defining as "qualified community organizations" under urban homestead programs entities that are, among other things, "exempt organizations under paragraph (3) or (4) of section 501(c) of Title 26"). Congress's use of the term "educational institutions" here, on the other hand, suggests to us that it intends FIRA to apply to the narrower category of entities suggested by the ordinary meaning of that term.

Our reading of the statute is also supported by its legislative history. In the 98th Congress, Representatives English and Kindness sponsored a bill to, *inter alia*, modify the fee provisions of FOIA. Included among the preferred requesters under that bill were not only educational institutions and representatives of the news media as in FIRA, but also "nonprofit group[s] that intend[] to make information available to the news media, any branch or agency of Federal, State or local government, or the general public." H.R. 6414, 98th Cong. § 4 at 9 (1984). That bill died, but its lineal descendant surfaced in the 99th Congress, when Senators Leahy and Hatch cosponsored an amendment to the Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1985), that

included fee provisions virtually identical to those in the earlier House bill. It was this amendment that eventually became FIRA. As part of an apparent legislative compromise, however, not all the language from the earlier House bill was preserved. Conspicuous by their absence from the preferred category were "nonprofit group[s] that intend[] to make information available [etc.]."

The Archive claims to be an educational institution based solely upon its intention to make the information it receives through FOIA requests available to scholars, the news media, and the general public in its "non-profit research institute and library." The implication to be drawn from Congress's shortening the list of preferred requesters in the version of FIRA that was finally enacted, as compared with the list in the earlier House bill, counts strongly against the Archive's being preferred on the ground that an organization that engages in those activites is an educational institution. The obvious implications are that an organization that "makes information available" is not an educational institution, and that the longer list included, and the shorter list does not include, such organizations. The Archive strives mightily to provide an alternative, non-obvious interpretation of the difference in the bills, based upon the remarks of several of FIRA's cosponsors. That legislative history is insufficient, however, to persuade us to depart from the obvious interpretation of Congress' deletion of the above-quoted language.

The amendment to the anti-drug bill that became FIRA was proposed on the floor of the Senate in the closing days of the 99th Congress. Accordingly, it was enacted in haste and without having been referred to the committees that would normally have generated a legislative history to which we could look for guidance as to the meaning of the statute. In such circumstances, the Supreme Court has

held that we must look to the statements of the sponsors of the bill as "the only authoritative indications of congressional intent." *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982).

Here, the floor statements of the cosponsors are in conflict. Senator Hatch explained, when the bill was initially presented to the Senate, that the elimination of the language covering entities that intend to make information available to others meant that the revised fee provisions "are not intended to permit a fee waiver to any requester simply on the basis of his status as a disseminator of public information. . . . Of course, a true 'media' requester, in the traditional and common sense meaning of that term, should be treated otherwise, as is clearly provided for in the plain language of the bill." 132 Cong. Rec. S16505 (daily ed. Oct. 15, 1986). Senator Leahy, on the other hand, indicated that he thought that "FOIA requesters engaged in the dissemination of information to the public—and that of couse is the primary function of libraries and private repositories of public documents—would qualify for waiver or reduction of fees under the FOIA." 132 Cong. Rec. S16496 (daily ed. Oct. 15, 1986). He provided no explanation, however, for the deletion of the language that would clearly have applied to such entities. *See id.*; 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986). In the House, Representatives English and Kindness acknowledged the deletion of the relevant language, but contended that the deletion was without effect because Senator Leahy's statements, and their statements to the same effect, constituted the legislative history of the statute, and that "[i]t is unnecessary, therefore, to amend the text of the bill since the intent has been so clearly stated." 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986).

In sum, the Senate amendment omitted the precise language of the earlier House bill that would have covered the Archive; one of the sponsors of the bill indicated that the omission was intended to change the meaning of the bill, and the others disagreed. Although the legislators were thus apprised of the two different interpretations they were apparently content to vote without resolving the dispute, thus punting the issue to the courts. In this circumstance, we must fall back upon the conventional inference that a change in legislative language is not without effect; any other recourse would require the court to devise a defensible principle, for use when the sponsors' statements are "the only authoritative indications of congressional intent," by which to weigh the sponsors' conflicting statements—but the Archive suggests none, and we do not see one. We are left, then, with the sponsors of the bill in conflict; we cannot, therefore rely upon any of their statements to supply a meaning that we do not find on the face of the statute when read as ordinary language.

We conclude that the Archive is not, merely because it intends to make information available to the public, an educational institution, and that, to the extent that DoD's regulations provide that only schools are eligible for that status, those regulations mirror congressional intent.

B. ***"A Representative of the News Media"***

The Archive may yet achieve preferred status under FIRA if it qualifies as "a representative of the news media." Viewed in isolation, it is not self-evident what that term covers, but when we turn to the legislative history of FIRA for guidance, we see that the sponsors were not in any disagreement relevant to the resolution of this issue; they unambiguously envisioned that an organization such as the Archive comes within the term.

Although the parties are at odds over how to describe the Archive's activities, the differences in their descrip-

tions are tonal rather than substantive. What the Archive does is not open to serious doubt; it is whether its activities qualify as those of a representative of the news media that forms the real ground for debate. The Archive relies upon a number of its different endeavors to support its claim to be a representative of the new media. With one key exception, however, each of those endeavors is, in the end, a way of making information available to the public; for reasons we have already explored, such activities are insufficient to establish an entitlement to preferred status. The single exception is the Archive's plan to act, in essence, as a publisher, both in print and in other media.

The Archive has previously published only one book (entitled *The Chronology: The Documented Day-By-Day Account of the Secret Military Assistance to Iran and the Contras*), but it has expressed a firm intention, which DoD does not here question, to publish a number of what it refers to as "document sets." Each of the document sets it had planned at the time of the administrative proceedings will be devoted to a particular topic of current interest, including current United States policies toward various countries and regions, aspects of nuclear weapons policy, relations between the superpowers, the structure of major alliances and of the non-aligned movement, etc. *See, e.g.*, A Development Grant Proposal for the National Security Archive at 8-11 (March 1, 1986) (Grant Proposal).

The Archive will obtain the raw materials for its document sets not only by means of FOIA requests but also from: papers declassified by the Government under the Mandatory Declassification Review process; interviews with, and private records of, present and former government officials; official statements, publications, and press releases; court opinions and records; testimony before Congress; newspaper and periodical accounts of recent events; and reports by congressional committees and the

General Accounting Office. *See id.* at 4-6. From these documents, the Archive's staff will cull those of particular interest in a given subject area to form the core of each document set. The staff will then supplement the chosen documents with "detailed cross-referenced indices, other finding aids, and a sophisticated computerized retrieval system" in order to make it more accessible to potential users. Declaration of R. Scott Armstrong at 1 (May 4, 1987). Sales of microform copies of these document sets will be the Archive's main source of revenue, apart from foundation grants. *See* Grant Proposal at 12; Brief for the Appellee at 6-7.

The activities we have just described are, we think, well within the range that Congress ascribed to a "representative of the news media." The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'* " 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis added). Representatives English and Kindnes echoed Senator Leahy's sentiments: "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, *or other entity that is in the business of publishing or otherwise disseminating information to the public* qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis added). In the light of this catalog of examples, "representative[s] of the news media," a term which we are to interpret broadly, clearly encompasses the Archive, whose compilation and distribution of document sets is surely "publishing or

otherwise disseminating information." Unlike merely, in the words of the original House bill, "mak[ing] information available" in the Archive's private research institute and library, the Archive's intended distribution of document sets entails the kind of initiative we associate with "publishing or otherwise disseminating" that information.

DoD attempts to minimize the significance of this legislative history by suggesting that Senator Hatch was of a different mind. DoD points to this part of his explanation of the sponsors' decision not to include some of the language from the original House bill:

> [O]rganizations seeking to establish *private repositories* of public records shall not qualify for a waiver. These groups purport to act as an *intermediary* between the Government and requesters in seeking records that requesters could seek directly from the Government. This type of *private library* of public documents, whether operated for profit or not, should not qualify for a waiver . . . .

132 Cong. Rec. S14040 (Sept. 27, 1986) (emphases added). The Senator later reiterated this concern: "[I]nformation vendors, data brokers, and other second-hand disseminators of documents who do so at a price as the means of their economic self-sufficiency, should not qualify . . . under any reasonable construction of the term 'media.' " 132 Cong. Rec. S16505 (Oct. 15, 1986).

As we read Senator Hatch's statement, he was concerned only with two groups. The first group, comprised of "private librar[ies]" or "private repositories," we have already determined to be without the preferred category. The second group, middlemen ("intermediar[ies]" or "information vendors [or] data brokers") that request documents for use by others, seems to refer to organizations that "purport to act" on behalf of specific parties

("requesters"); the implication is that the "requesters" themselves are either unaware that they could get records "directly from the Government," or simply find it more efficient to employ a service. The Archive does not, however, make FOIA requests as an agent for others who want access to government documents; it gets the documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedic work that it will then offer to the public. There is simply no indication that Senator Hatch had in mind an organization that, like the Archive, gathers information from a variety of sources; exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them; devises indices and finding aids; and distributes the resulting work to the public. Without suggesting that any one of these activities is either necessary or sufficient for a person or organizaton to be a "representative of the news media," we think it clear that an organization that engages in all of them "publishes or otherwise disseminates information to the public" and is thus well within that concept. What is more, we do not read Senator Hatch to say anything to the contrary.

A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. Surely when a newspaper publisher, such as the New York Times Company, brings out *The Pentagon Papers* in the form of a paperback book, adding perhaps an introduction and an index, it is acting as a representative of the news media every bit as much as when it publishes a daily newspaper; and as we have seen, that is it the same sort of venture as, indeed one involving less editorial input than, the one in which the Archive is engaged.

Accordingly, we conclude that the Archive is a representative of the news media within the meaning of FIRA.

C. *The Archive's Alleged "Commercial" Purpose*

Finally, DoD contends that, even if the Archive is a representative of the news media, "those entities that fall within the preferred fee category must also establish that the records 'are not sought for a commercial use.' " As far as it goes, this statement is entirely accurate; there is no reason to treat an entity with news media activities in its portfolio, such as CBS, Inc. or the Washington Post Co., as a "representative of the news media" when it requests documents, from let us say the SEC, in aid of its nonjournalistic activities.

DoD pushes the point further, however, contending that the Archive's intention to sell its document sets may itself be a commercial purpose. DoD's regulation defining the general contours of "commercial use" does define that term as "a use or purpose that furthers the commercial, trade, or profit interest of the requester." 32 C.F.R. § 286.33(e)(3)(i). Its specific regulation regarding requests by representatives of the news media provides, however, that "[a] request for records supporting the news dissemination function of the requester shall not be considered a request that is for a commercial use." 32 C.F.R. § 286.33(e)(7)(ii). Thus, at least insofar as the Archive will use the fruits of its FOIA requests as raw material for its document sets (as it represents it will), such requests will not, under the DoD regulation, "be considered a request that is for a commercial use."

DoD's argument to the contrary here would also frustrate Congress' purpose to give the news media special status. Most news media organizations are for-profit enterprises. Yet DoD would require that they pay the full

fee for documents they request in support of their news-gathering and publication functions. DoD's argument is contrary to the manifest purpose of FIRA, the plain meaning of the applicable regulation, and common sense. Accordingly, we reject it.

III. CONCLUSION

The Archive is not an educational institution. On the other hand, based upon the Archive's submissions (which DoD has offered us no reason to doubt), it is a representative of the news media by reason of its publication activities; therefore, insofar as its requests are in furtherance of that function, the Archive is entitled to be charged only for duplication costs. We note, however, that our conclusion is writ on paper in ink; it is not chiselled in granite. If the Archive's intention to publish works derived from the documents it requests does not pan out, it will be open to DoD to argue that the Archive is no longer a representative of the news media. Absent such a change in circumstances, however, the Archive is entitled to preferred status.

So Ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-3454

NATIONAL SECURITY ARCHIVE, PLAINTIFF

v.

U.S. DEPARTMENT OF DEFENSE, DEFENDANT

[Filed June 16, 1988]

MEMORANDUM

This case is before the Court on cross-motions for summary judgment. After carefully considering the motions, the opposition to them, the oral arguments of the parties, and the record in this case, the Court concludes that plaintiff's second motion for summary judgment should be denied, and that DoD's motion for summary judgment should be granted.

Plaintiff filed this action under the Freedom of Information Act (the FOIA), 5 U.S.C. § 552 *et seq.*, claiming that the United States Department of Defense (DoD) wrongfully refused to consider plaintiff as a preferred institution under the FOIA Amendments of 1986 (the Amendments), 5 U.S.C. § 552(a)(4)(A), for the purposes of fee assessments. Plaintiff, which has numerous FOIA requests pending before the DoD, claims that it should be

treated as either an educational institution or as a representative of the news media, and that it therefore should have to pay only duplication fees when it seeks documents. Plaintiff also contends that it is not a commercial requester for the purposes of the Amendments.

DoD contends that the case is not ripe because plaintiff might be entitled to have search and review fees waived if DoD determines pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) that the release of the documents which plaintiff seeks is in the public interest. DoD also contends that its determination that plaintiff is neither an educational institution nor a representative of the news media should be upheld. DoD maintains that its placement of plaintiff in the "other" category of requesters under 5 U.S.C. § 552(a)(4)(A)(ii)(III) is proper.

I.

It appears that DoD will not process plaintiff's requests unless plaintiff agrees to incur fees for the search and review of documents.[1] Plaintiff will be obligated to pay those fees unless DoD subsequently waives them under the public interest exemption. Thus, DoD would force plaintiff to risk liability for search and review costs before allowing it to seek judicial review of the denial of a waiver based upon status.

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[1] The parties disputed this point at oral argument on January 26, 1988. In response to the assertion of counsel for DoD that no FOIA requests are being held up, plaintiff submitted a copy of a letter dated September 25, 1987 from a DoD employee, W. M. McDonald, to one of plaintiff's employees, Donna Rich. The letter indicates that absent a commitment to pay search costs exceeding $100, plaintiff's requests will remain on hold unless DoD determines after a brief search that a request is likely to further the public interest.

The Court concludes that DoD's denial of a waiver based upon status is sufficient to render this dispute ripe for judicial review since DoD will not process plaintiff's requests without assessing additional fees. There is a concrete legal dispute, and plaintiff's strong interest in the prompt consideration of the allegedly unlawful agency action is not outweighed by any hardship to the agency or by a significant judicial interest in favor of delay. *See Payne Enterprises, Inc. v. United States,* 837 F.2d 486, 492-494 (D.C. Cir. 1988). Furthermore, the legislative history of the 1986 Amendments indicates an intent to have disputes over fee waivers determined at an early stage. *See* 132 Cong. Rec. H 9463 (daily ed. October 8, 1986) (joint analysis of Reps. English and Kindness) ("Agency regulations must include procedures whereby a requester can determine its status for purposes of fee categories . . . at the time the request is made.").

II.

Under the Amendments, educational institutions whose purpose is scholarly research, and representatives of the news media are entitled to the waiver of search and review fees if they seek to obtain documents for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Congress did not define the terms "educational institution" or "representative of the news media." Instead, it delegated to the agencies the task of promulgating regulations setting forth the procedures and guidelines for determining requests for waivers. 5 U.S.C. § 552(a)(4)(A)(i). The standard of review of the denial of a waiver is *de novo,* and review is limited to the record that was before the agency. 5 U.S.C. § 552(a)(4)(A)(vii).

Defendant adopted a regulation which states in relevant part:

> The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. . . .
>
> The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public.

32 C.F.R. § 286.33(e)(4) and (7).

In support of its application for a waiver, plaintiff relied in large part upon the lengthy and detailed declaration of its executive director, R. Scott Armstrong. Exhibit C to Amended Complaint, filed June 11, 1987 (Armstrong Decl.). The declaration states that plaintiff is a public interest, scholarly research institute and library, the primary function of which is to make available government information regarding foreign, defense, intelligence and international economic policy. *Id.* at 1. The declaration describes plaintiff's employees and consultants as a collection of scholars and experts in various subject areas. *Id.* at 3-4. Armstrong represents that the bulk of plaintiff's work in the creation of its "archival" services involves the preparation of detailed indexes and finding aids which facili-

tate the use of the documents for research. *Id.* at 6. Plaintiff's materials are open to the public without charge. *Id.* at 1. Armstrong also notes that plaintiff is a division of the Fund for Peace, Inc., a non-profit corporation to which the Internal Revenue Service (I.R.S.) has granted tax-exempt status as an entity organized and operated exclusively for educational purposes. *Id.* at 4.

Armstrong represents that plaintiff, its staff, and affiliated scholars have disseminated or will disseminate information in a variety of ways, including: working closely with journalists and scholars (*see, e.g.*, attachments to exhibit B of Plaintiff's Second Motion for Summary Judgment, filed November 20, 1987); publishing an account of the "Iran-Contra Affair"; publishing articles relating to document sets; publicizing plaintiff's holdings; participating in or organizing conferences; and appearing in public forums. *Id.* at 7-8; and Second Declaration of R. Scott Armstrong, filed as exhibit 2 to exhibit B to Plaintiff's Second Motion for Summary Judgment. In the future, plaintiff plans to sell document sets and indexes to libraries. Armstrong Decl. at 8.

Plaintiff does not contest DoD's determination that it is neither an education institution nor a representative of the news media within the meaning of DoD's regulations. Thus, looking at the matter *de novo*, the Court has no basis to disagree with DoD's determination under the regulations.[2] However, plaintiff contends that DoD's

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[2] Plaintiff appears to urge the Court to review DoD's action without regard to the regulations. Doing so would render both the regulations and Congress's direction to promulgate them meaningless. When Congress leaves gaps in a program by authorizing the agency to adopt implementing regulations, it has delegated to the agency the power to fill those gaps. *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-82 (1984); *National Fuel Gas Supply Corp. v. F.E.R.C.*, 811 F.2d 1563, 1569 (D.C. Cir. 1987).

regulations do not comport with the intent of the statute in that they are too narrow. Plaintiff asserts that the legislative history of the statute reveals Congress's intent to allow for waivers for an entity like plaintiff within the definitions of either an educational institution or a representative of the news media.

In reviewing an agency's interpretation of a statute committed to its administration a court must first look to the legislation. *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781 (1984); *Common Cause v. Federal Election Commission*, 842 F.2d 436, 439 (D.C. Cir. 1988); *National Fuel Gas Supply Corp. v. F.E.R.C.*, 811 F.2d 1563, 1569 (D.C. Cir. 1987). If the statute and its legislative history reveal a clear intent, that intent must be adhered to. *Id.* If, however, they are silent or ambiguous, the agency's construction should be upheld if it is a reasonable one. *Id. National Fuel* indicates that the agency's interpretation is entitled to some deference where it has exercised congressionally granted authority even if it is not clear that the interpretation rests upon technical expertise. 811 F.2d at 1570. Whatever the amount of deference to which it is entitled, the agency's interpretation must harmonize with the statute's origin and purpose to be considered reasonable. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26, 102 S.Ct. 821, 828 (1982).

Congress did not define the relevant terms in the statute, and it left the task of forming guidelines to the agency. 5 U.S.C. § 552(a)(4)(A)(i). Thus, the language of the statute itself does not resolve the issue here, for depending upon how broadly the language is read, it could support either party's position. Nor does the legislative history of the amendments, which primarily consists of the sponsors' remarks, show a clear intent in plaintiff's favor. If anything, the legislative history reveals a clear congressional decision to deny status waivers to entities like plaintiff.

The remarks of Senator Hatch, a co-sponsor of the Amendments, strongly support the view that Congress did address the issue, and that it did not intend that entities like this plaintiff would obtain a waiver under 5 U.S.C. § 552(a)(4)(A)(ii). *See* 132 Cong. Rec. S 14038, 14040 (daily ed. September 27, 1986). After noting that the fee waiver provision was taken from H.R. 6414, a bill introduced in the 98th Congress, Sen. Hatch stated that "we are removing the language '*nonprofit group that intends to make the information available*' to clarify that organizations seeking to establish private repositories of public records shall not qualify for a waiver."[3] *Id.* (emphasis added). This language had been included in the provision which is now found at 5 U.S.C. § 552(a)(4)(A)(ii)(II). Arguably, the removed language describes plaintiff perfectly, and according to Sen. Hatch, the language was in fact removed to deny a "status" waiver to an entity like plaintiff.[4]

While Sen. Hatch appears to have been in the minority among the sponsors in generally asserting a narrower reading of the Amendments, he certainly was not advocat-

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[3] The language of H.R. 6414 after the word "available" quoted above is "to the news media, any branch or agency of Federal, State or local government, or the general public."

[4] Senators Kerry and Leahy appear to discuss the statement of Sen. Hatch in a colloquy which is found at 132 Cong. Rec. S 16496 (daily ed. October 15, 1986). In response to a query from Sen. Kerry regarding the scope of the waivers, Sen. Leahy states in part, "FOIA requesters engaged in the dissemination of information to the public—and that of course is the primary function of libraries and repositories of public documents—would qualify for waiver or reduction of fees under the FOIA." *Id.* The language in Sen. Leahy's response as a whole indicates that he was assuring Sen. Kerry that libraries and other repositories would qualify for waivers or reductions based upon the "public interest" provision in 5 U.S.C. § 552(a)(4)(A)(iii).

ing the "losing" position in regard to the alteration of H.R. 6414. *Compare* 132 Cong. Rec. H 9463 (daily ed. October 8, 1986) (remarks of Rep. English) ("I am not in complete agreement with the Senate changes to [H.R. 6414]."). Given the deletion of express language that would have applied to plaintiff, the Court cannot conclude that Congress clearly intended to include an entity like plaintiff in the remaining categories in 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Since the Court cannot conclude that Congress clearly intended that an entity like plaintiff would be entitled to a waiver based upon its status, the Court should uphold DoD's decision not to consider plaintiff to be an educational institution or a representative of the news media if that decision is based upon a reasonable interpretation of the Amendments.

Plaintiff asserts that it is unreasonable to limit educational institutions under the Amendments to schools with programs of scholarly research. It argues that its purpose of educating the public by disseminating government information is sufficient to qualify it as an educational institution. It also contends that the Fund for Peace's tax-exempt status as an educational institution shows that plaintiff should have this status for the purpose of fee waivers.

First of all the fact that the I.R.S. treats the Fund for Peace as an educational institution does not mean that DoD is bound to apply that determination to plaintiff. Secondly, DoD adopted a neutral definition of "educational institution," which although narrow, is hardly irrational when applied to this plaintiff. Apparently, this definition is based upon the definition adopted by the Department of Education for the purposes of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* *See* 34 C.F.R. § 106.2(j). Neither the language of the

statute nor the legislative history indicates that every entity which educates the public by making information available should be treated as an educational institution. In fact, the legislative history indicates that libraries and other repositories of documents are to be treated separately from educational institutions. *See supra* p. 7-8 and *infra* p. 11-12.

Plaintiff argues that the legislative history of the Amendments shows a clear intent to treat disseminators of information as representatives of the news media. For instance, plaintiff cites to the remarks of Sen Leahy, 132 Cong. Rec. S at [*sic*] 14298, and to the joint analysis of Reps. English and Kindness, 132 Cong. Rec. at H 9464, which state that "[t]he bill provides the most favorable fee provision for those in the information dissemination business. . . ."

Even if the legislative history cited by plaintiff stated the unequivocal intent of Congress, *cf.* 132 Cong. Rec. S 16505 (daily ed. October 15, 1986) (remarks of Sen. Hatch), it would not necessarily preclude DoD's interpretation, which requires the regular publication or broadcast of news. *See* 32 C.F.R. § 286.33(e)(7)(i). The remarks cited by plaintiff, even when they refer to non-traditional media, still seem to contemplate some sort of regular publication, broadcast, or other transmission of news. Plaintiff's function does not appear to be "similar to that of newspapers and broadcasters." Joint Analysis of Reps. English and Kindness at H 9464.

Perhaps the strongest argument in favor of upholding DoD's denial of a waiver to plaintiff is that Congress considered language that would directly address an entity like plaintiff, but it chose to delete that language. *See supra* p. 7-8; *see also McClellan Ecological Seepage Situation v. Carlucci,* 835 F.2d 1282, 1284 (9th Cir. 1987) (public interest groups are not entitled to a waiver based upon

status). In this context it would be hard to consider DoD's interpretation unreasonable. Apparently, plaintiff is trying to obtain a status waiver through the judicial process after entities like it were denied such waivers in the legislative process.

It is not unreasonable to conclude that Congress intended that an entity like plaintiff would be entitled to a waiver or reduction of fees only under the public interest exception at 5 U.S.C. § 552(a)(4)(A)(iii). As is noted *supra* at n.4, Sen. Leahy appeared to assuage Sen. Kerry's concerns regarding waivers for public interest groups, libraries, and other repositories of government information by assuring him that these entities would qualify for liberal waivers or reductions based upon their use of documents which they request. Even plaintiff asserts that Reps. English and Kindness appeared to refer to entities like itself when they stated in their joint analysis that

> A request from a public interest group, nonprofit organization, labor union, library, or similar organization, or a request from an individual may not be presumed to be for commercial use unless the nature of the request suggests that the information is being sought solely for a private, profit making purpose.

Joint Analysis of Reps. English and Kindness at H 9463 (as corrected by statement of Rep. English at 132 Cong. Rec. E 3596 (daily ed. October 10, 1986)), *quoted in* Plaintiff's Second Motion for Summary Judgment at 26. Although educational institutions and media representatives must also pass a non-commercial use test, Reps. English and Kindness appeared to address these remarks to groups in the "other" category under 5 U.S.C. § 552(a)(4)(A)(ii)(III). Those entities are not entitled to waivers of search costs based upon their status.

Even if the *de novo* review standard allowed the Court to disregard the DoD's regulation, 32 C.F.R. § 286.33(e), the agency's determination would be upheld because it is not only a reasonable one, but it is also the one Congress most likely intended.

III.

DoD asserts that even if plaintiff is an educational institution or a representative of the news media, DoD cannot grant it a blanket fee waiver because it cannot determine that plaintiff is not commercial user. *See* Letter from William McDonald to David L. Sobel, dated November 13, 1987, at 5-6, attached as exhibit C to Plaintiff's Second Motion for Summary Judgment. DoD maintains that plaintiff's intent to sell sets of government documents to libraries prevents a determination that plaintiff is not a commercial organization. *Id.*

The Court need not decide whether plaintiff might be a commercial user in the future, since DoD has placed plaintiff in the "other" category, and it is not treating plaintiff as a commercial user. This issue is not ripe for adjudication, and a decision based upon events which might occur would be advisory. Here, the Court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting outweigh any interests plaintiff might have in challenging DoD's position at this time.[5]

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[5] This case is distinguishable from *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 492-494 (D.C. Cir. 1988), where the challenged agency practice had a direct and immediate impact upon the plaintiff.

IV.

In view of the above, the Court concludes that plaintiff's second motion for summary judgment should be denied, and that DoD's motion for summary judgment should be granted. DoD's determination that plaintiff is neither an educational institution nor a representative of the news media for the purpose of obtaining a waiver of fees under the FOIA should be upheld. A separate Order consistent with this Memorandum has been issued.

Date: JUN 15, 1988

John Garrett Penn

JOHN GARRETT PENN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Civil No. 86-3454
No. 88-5217

NATIONAL SECURITY ARCHIVE, APPELLANT

v.

U.S. DEPARTMENT OF DEFENSE

[Filed July 28, 1989]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: ROBINSON, MIKVA, and D.H. GINSBURG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in part and reversed in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: 7-28-89
Opinion for the Court filed by
Circuit Judge D.H. Ginsburg

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CA 86-03454
No. 88-5217

NATIONAL SECURITY ARCHIVE, PETITIONER

v.

U.S. DEPARTMENT OF DEFENSE

[Filed Sep. 26, 1989]

Before: MIKVA, and D.H. GINSBURG, Circuit Judges and ROBINSON, Senior Circuit Judge

ORDER

Upon consideration of appellee's petition for rehearing, filed September 11, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, Clerk
BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CA 86-03454
No. 88-5217

NATIONAL SECURITY ARCHIVE, PETITIONER

v.

U.S. DEPARTMENT OF DEFENSE

[Filed Sep. 26, 1989]

Before: WALD, Chief Judge; MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, Clerk
BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-3454

NATIONAL SECURITY ARCHIVE, PLAINTIFF

v.

U.S. DEPARTMENT OF DEFENSE, DEFENDANT

[Filed June 16, 1988]

ORDER

After carefully considering plaintiff's second motion for summary judgment, defendant's motion for summary judgment, the opposition to those motions, and the entire record in this case, and for the reasons set forth in an accompanying Memorandum, it is hereby

ORDERED that plaintiff's second motion for summary judgment is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that defendant's determination that plaintiff is not entitled to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii)(II) is affirmed; and it is further

ORDERED that this case is dismissed.

Date: JUN 15, 1988

John Garrett Penn

JOHN GARRETT PENN
United States District Judge

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